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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MONTEREY BAY MILITARY
HOUSING, LLC, et al.,

Plaintiffs and Respondents,

v.

AMBAC ASSURANCE CORPORATION
et al.,

Defendants and Appellants.

JEFFERIES MORTGAGE FINANCE,
INC.,

Third Party and Appellant.

H044948
(Monterey County
Super. Ct. No. 15CV000599)

Third party Jefferies Mortgage Finance Inc. (Jefferies) appeals several discovery orders entered against it in the trial court. While the appeal was pending, the underlying litigation was settled and dismissed rendering the discovery orders and this appeal moot. Instead of dismissing its appeal, Jefferies asks us to vacate the orders. Respondents Monterey Bay Military Housing LLC and Monterey Bay Land LLC (respondents) do not oppose the motion. We will treat the motion as one for stipulated reversal and grant it.

I. PROCEDURAL BACKGROUND

Respondents were developers involved in efforts to privatize a military housing development at the Presidio of Monterey. Ambac Assurance Corporation (Ambac) provided credit enhancement for the project. Respondents brought an action against

Ambac (Underlying Action), for declaratory relief regarding respondents' duties to fund debt reserves for the project.

Jefferies was not a party to the Underlying Action. Rather, Jefferies had acquired certain assets including the note for a loan that had been provided for the project. Respondents sought discovery from Jefferies regarding the Monterey projects involved in the Underlying Action, as well as numerous other military housing projects around the country. While Jefferies produced many documents in response to respondent's subpoena, respondents filed numerous motions to compel further production. The trial court granted a number of motions to compel. Jefferies appealed these orders. Subsequently, Ambac filed an appeal from the judgment in the Underlying Action.

While the appeals were pending, respondents and Ambac settled the Underlying Action. Jefferies was not a party to this settlement. Respondents filed an "Acknowledgement of Satisfaction of Judgment" in the Underlying Action pursuant to Code of Civil Procedure section 724.030 on July 2, 2018, and the parties moved this court to dismiss Ambac's appeal. We dismissed Ambac's appeal by order dated July 3, 2018.

Thereafter, Jefferies and respondents jointly moved this court to vacate the discovery orders and dismiss the appeal as moot. We denied the motion without prejudice to filing a motion pursuant to Code of Civil Procedure section 128, subdivision (a)(8). Jefferies again moves to vacate the orders and dismiss the appeal or, in the alternative, for a stipulated reversal of the discovery orders. Jefferies states that reversal is necessary because the parties continue to litigate these discovery issues in litigation that is ongoing in federal court. Respondents do not oppose Jefferies' motion.

II. DISCUSSION

The parties have stipulated that, by virtue of the respondents' settlement of the Underlying Action with Ambac, the discovery orders directed to third-party Jefferies "are

no longer operative, Respondents will not seek to enforce them against Jefferies and this appeal is moot.” Instead of requesting dismissal of the appeal as moot, Jefferies requests that we reverse the discovery orders pursuant to the parties’ stipulation.

A. Reversal and Remand Pursuant to Paul v. Milk Depots, Inc. (1964) 62 Cal.2d 129 is not Appropriate

Jefferies contends that where events subsequent to the filing of an appeal have rendered the orders appealed from moot, the preferable procedure is to vacate the superior court’s orders, while “qualif[ying]” the vacatur “so as not to imply that the judgment was in error, only moot.” (*Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2011) 198 Cal.App.4th 939, 943-944 (*Coalition for a Sustainable Future in Yucaipa*).) In *Coalition for a Sustainable Future in Yucaipa*, the trial court denied a writ of mandate related to the construction of a shopping center project. By the time the appeal from that order was at issue, the project had been abandoned. Relying on *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129 (*Paul*), the Court of Appeal reversed the judgment, specifying that the reversal did not imply that the judgment was erroneous on the merits, but that the reversal was intended to return jurisdiction to the trial court with direction to dismiss the underlying action as moot. (*Coalition for a Sustainable Future in Yucaipa, supra*, at pp. 941-942.)

In *Paul* the Department of Agriculture sought an injunction and penalties against a company that sold milk below the price specified by relevant regulation. The trial court entered an order and the Department appealed. Before the appeal could be decided, both the regulation in question and the company ceased to exist. In reversing and remanding to the trial court to dismiss the underlying action as moot, the Supreme explained that, “when a case becomes moot pending an appellate decision ‘the court will not proceed to a formal judgment, but will dismiss the appeal.’ [Citation.] . . . ‘The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from’ As we do not reach the merits of the appeal in the case at bench, it is appropriate to avoid thus

‘impliedly’ affirming a judgment Since the basis for that judgment has now disappeared we should ‘dispose of the case, not merely of the appellate proceeding which brought it here.’ [Citation.] That result can be achieved by reversing the judgment solely for the purpose of restoring the matter to the jurisdiction of the superior court, with directions to the court to dismiss the proceeding. [Citations.] Such a reversal, of course, does not imply approval of a contrary judgment, but is merely a procedural step necessary to a proper disposition of this case.” (*Paul, supra*, 62 Cal.2d at pp. 134-135.)

Jefferies’ reliance on the *Paul* line of cases is misplaced because the case before us is factually distinguishable. The *Paul* and *Coalition for a Sustainable Future in Yucaipa* courts reversed the judgments on appeal primarily to return jurisdiction of the litigation to the trial court so it could enter an order terminating the moot litigation. In those cases, the conditions leading to the litigation itself—regulations, parties and projects—had ceased to exist, but the litigation continued by way of appeal. The disposition was justified because not only was the appeal moot, but the entire controversy underlying the litigation was moot. Dismissing the appeal alone would not correctly reflect the status of the controversy. The appellate courts concluded that reversal and remand was the correct procedural mechanism to allow the trial court to respond to the change in circumstances, and to “ ‘dispose of the case, not merely of the appellate proceeding.’ ” (*Paul, supra*, 62 Cal.2d at p. 135.)

Similar circumstances do not exist here. All discovery orders issued in the underlying litigation, including those issued against third party Jefferies, have become moot by virtue of the fact that the underlying litigation itself has been settled and dismissed. Civil discovery is intended to ease the course of litigation and the pretrial process. (*Fuss v. Superior Court for Los Angeles County* (1969) 273 Cal.App.2d 807, 818.) Discovery orders entered during the pretrial process generally have no lasting import once the litigation in which the orders are issued ends. Absent unusual

circumstances, an appeal therefrom is moot once the underlying litigation has been settled and dismissed. There is nothing unusual about the orders on appeal here.

However, while the appeal is moot, a *Paul* disposition of reversal and remand is not appropriate in this case. First, by the parties' own admission, the discovery controversies addressed in the orders on appeal are not moot because they continue in other litigation in other courts. The parties desire a reversal instead of a dismissal to preclude any collateral estoppel effect these orders may have on ongoing litigation. Second, reversal and remand to the trial court for the purpose of dismissing the action would be futile where the underlying action has already been dismissed by the parties and the discovery orders create no further obligation in this case. Therefore, *Paul* does not afford the parties the remedy they seek.

B. Stipulated Reversal

Alternatively, Jefferies requests that we grant its motion for stipulated reversal pursuant to Code of Civil Procedure section 128, subdivision (a)(8). That section, in relevant part states, "An appellate court shall not reverse or vacate a duly entered judgment upon an agreement or stipulation of the parties unless the court finds both of the following: [¶] (A) There is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal. [¶] (B) The reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement." A request for stipulated reversal is the appropriate vehicle for obtaining a reversal of the orders on appeal here.

The parties stipulate that the orders, "are no longer operative," and that "Respondents will not seek to enforce them against Jefferies" The reason that the parties seek a stipulated reversal, instead of simply dismissing the appeal as moot, is to

“permit the parties to litigate the issues giving rise to those orders elsewhere.”¹ They contend that the now moot orders have not been fully litigated, and should not, therefore, have a “preclusive effect” in other ongoing litigation. The parties continue to litigate the issues addressed by these orders in federal court. A reversal, they contend, will allow the parties to fully develop and resolve these issues on the merits in litigation that has not been dismissed.

The motion supports the conclusion that a stipulated reversal is appropriate under the facts of this case and the law. (See Code Civ. Proc., § 128, subd. (a)(8).) For the reasons stated in the motion for stipulated reversal—including allowing the parties to resolve the underlying issues in a venue where the case continues to be litigated, rather than be collaterally estopped by moot orders that have not been fully litigated—the court finds that there is no possibility that the interests of nonparties or the public will be adversely affected by the reversal.

This court further finds that the parties’ grounds for requesting reversal are reasonable. Those grounds outweigh the erosion of public trust that may result from the nullification of the orders and outweigh the risk that the availability of a stipulated reversal will reduce the incentive for pretrial settlement. The discovery orders on appeal were collateral to the Underlying Action as they were directed to third parties. The Underlying Action having been settled and dismissed, the orders can have no impact on this case, and also cannot be fully tested and litigated. However, the parties continue to litigate the issues involved in this discovery dispute in another venue. We find there will

¹ We note that even if the appeal is moot, the parties could have asked us to consider the appeal. The ongoing nature of the issues addressed by the orders could be a basis for this court to do so. (*County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1006, as mod. (Sept. 22, 1998).) There is no guarantee, however, that we would have granted that request, especially where other courts are considering similar issues in litigation that is ongoing.

be no erosion of public trust if we reverse the orders entered in this action and allow the parties to fully litigate these disputes in an action that is ongoing.

III. DISPOSITION

The judgment is reversed pursuant to the stipulation of the parties. Each party shall bear its own attorney fees and costs on appeal. The remittitur shall issue forthwith.

Greenwood, P.J.

WE CONCUR:

Elia, J.

Grover, J.